

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHNNY BERNARD CALVIN,

Defendant-Appellant.

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UNPUBLISHED

May 15, 2012

No. 303718

Wayne Circuit Court

LC No. 06-006673-01

Before: MURPHY, C.J., and STEPHENS and RIORDAN, JJ.

PER CURIAM.

In February 2011, defendant was resentenced to concurrent prison terms of 28 to 50 years each for five counts of first-degree criminal sexual conduct (CSC-1), MCL 750.520b(1)(a) and (1)(b), and 10 to 15 years each for two counts of second-degree criminal sexual conduct (CSC-2), MCL 750.520c(1)(a). He appeals as of right. We affirm.

This case is before this Court for the third time. In 2006, defendant was convicted of sexually abusing his fiancé's daughters. The facts of the case are summarized as follows in *People v Calvin*, unpublished opinion per curiam of the Court of Appeals, issued December 11, 2007 (Docket No. 274240) ("*Calvin I*"):

Calvin's convictions arise out of the sexual abuse he committed against his fiancé's daughters while living with them. Calvin began sexually assaulting the first daughter when she was ten years old. Calvin would ask to see if she "was clean," lick her breasts and vagina, and state she "checked out okay." On more than ten occasions, Calvin approached her, told her that he wanted to "check" her, and repeated the sexual assault. When she was 12 years old, the sexual assaults escalated. Calvin would offer her money for sexual intercourse. Also, during the years of abuse, Calvin would enter her bedroom, stand next to the bed, lift her shirt, and masturbate until ejaculation. On at least two occasions, she witnessed Calvin do the same thing to her sister.

Calvin began sexually assaulting the second daughter when she was eight years old. After playing outside, she entered the house where Calvin told her she looked dirty. Calvin pulled her pants halfway down and rubbed her breasts and butt. When she was nine years old, Calvin would lick her breasts and vagina. At age ten, Calvin would wait for everyone to go to sleep, enter her room, pull the

covers off her, pull her pants down, and lick her. According to her, this happened on more than ten occasions. When she was 14 years old, Calvin tried to force penile penetration. She fought back, and he digitally penetrated her vagina. She testified Calvin digitally penetrated her more than ten times. Calvin would also enter her room and masturbate until ejaculation. She also witnessed Calvin sexually assault her sister on more than one occasion. She often saw Calvin in her sister's bedroom with his head between her legs.

In *Calvin I*, this Court affirmed defendant's convictions, but remanded for resentencing because the trial court departed from the sentencing guidelines range of 126 to 210 months and "gave no reasons at all" for the departure. *Id.*, unpub op at 5.

In September 2009, defendant was resentenced to concurrent prison terms of 30 to 60 years for each CSC-1 conviction, and 10 to 15 years for each CSC-2 conviction. He again appealed, and this Court again remanded for resentencing. Although this Court agreed that a departure from the sentencing guidelines range was appropriate, it determined that resentencing was required because the trial court failed to justify the extent of the departure in accordance with *People v Smith*, 482 Mich 292; 754 NW2d 284 (2008). *People v Calvin*, unpublished opinion per curiam of the Court of Appeals, issued December 21, 2010 (Docket No. 294761) ("*Calvin II*").

On remand, the trial court resentenced defendant to concurrent prison terms of 28 to 50 years for each CSC-1 conviction, and 10 to 15 years for each CSC-2 conviction. In the present appeal, defendant argues that the sentences of 28 to 50 years are disproportionate.

This Court reviews the extent of the departure and the proportionality of a sentence for an abuse of discretion. *Smith*, 482 Mich at 300; *People v Noble*, 238 Mich App 647, 661; 608 NW2d 123 (1999). "An abuse of discretion occurs when the trial court chooses an outcome falling outside the permissible principled range of outcomes." *People v Babcock*, 469 Mich 247, 274; 666 NW2d 231 (2003).

At defendant's most recent resentencing, the scoring of the sentencing guidelines was not disputed. Defendant's total OV score was 120 points, which placed him at OV Level VI (100+ points), and his total PRV score was 20 points, which placed him at PRV Level C (10 to 24 points). MCL 777.62. The guidelines range for a Class A offense at the C-VI cell is 135 to 225 months. MCL 777.62. For each CSC-I conviction, the court imposed a minimum sentence of 28 years (i.e., 336 months), which represents a departure of 111 months (or 9 years and 3 months) from the upper end of the sentencing guidelines range.

In *Smith*, our Supreme Court emphasized the necessity and importance of a trial court's explication and justification for both a departure from the sentencing guidelines and for "the particular departure made." *Smith*, 482 Mich at 303 (emphasis in original). Specifically, the Court referenced the applicable statutory language, which provides:

A court may depart from the appropriate sentence range established under the sentencing guidelines set forth in chapter XVII if the court has a substantial and

compelling reason for *that* departure. [*Smith*, 482 Mich at 303-304, citing MCL 769.34(3) (emphasis added by *Smith*).]

As a result of this requirement, the Court found:

A sentence cannot be upheld when the connection between the reasons given for departure and the extent of the departure is unclear. When departing, the trial court must explain why the sentence imposed is more proportionate than a sentence within the guidelines recommendation would have been. [*Smith*, 482 Mich at 304.]

Based on this language, it is clear that the reasons elucidated by a trial court for departure and justifying the proportionality of a sentence imposed are not mutually exclusive. Rather, the reasons for both the departure and its proportionality may overlap and, in some instances, be identical.

As set forth originally in *Babcock*, the “principle of proportionality . . . defines the standard against which the allegedly substantial and compelling reasons in support of departure are to be assessed.” *Babcock*, 469 Mich at 262. Accordingly, a review of the proportionality of a sentence imposed requires consideration of “whether the sentence is proportionate to the seriousness of the defendant’s conduct and to the defendant in light of his criminal record. . . . [E]verything else being equal, the more egregious the offense, and the more recidivist the criminal, the greater the punishment.” *Smith*, 482 Mich at 305, quoting *Babcock*, 469 Mich at 262-263. Ultimately, “[t]he departure from the guidelines recommendation must ‘contribute to a more proportionate criminal sentence than is available within the guidelines range.’” *Smith*, 482 Mich at 305, quoting *Babcock*, 469 Mich at 264.

Providing guidance for review of the proportionality of a sentencing guideline departure, the Court has indicated as an overriding precept that while “the atrocity of any criminal sexual conduct offense is not to be minimized, proportionality is still judged by weighing both the nature of the offense and the offender’s criminal history.” *Smith*, 482 Mich at 309. Specifically, the Court suggested the necessity of achieving a balance when reviewing sentencing departures on appeal. This Court is required to examine “the reasons articulated for departure” in conjunction with the explanation proffered by the trial court “of why the sentence imposed is more proportionate to the offense and the offender than a different sentence would have been.” *Id.* at 311. This is tempered by the recognition that although “the sentencing guidelines were designed to promote uniformity in sentencing” and “to minimize idiosyncrasies,” trial courts are not required to “sentence defendants with mathematical certainty” and that there exist no “precise words necessary . . . to justify a particular departure.” *Id.* (citation omitted).

We find that a review of the trial court’s decision at the most recent resentencing demonstrated both an understanding of its responsibility to explicate and justify the proportionality of the sentencing guideline departure in this case and met the requirements imposed by *Smith*. The trial court initially indicated that the circumstances pertaining to defendant’s conviction did not comprise “a typical CSC case.” The trial court noted that the “circumstances and . . . facts are horrific” involving “two children who put trust in a relationship that they had with a father figure and that that [sic] trust was completely and totally misplaced.”

The trial court emphasized that the children were “completely and totally violated and victimized for years; for years, for years, for years. . . .” Specifically, the trial court noted that “the guidelines have not adequately taken into account that these were children when these horrific offenses took place,” the “profound[ly]” “predatory” nature of defendant’s behavior and the impossibility of a full emotional recovery for these children from the effects of defendant’s violation of their youth and trust. In addition, the trial court focused on the extended time over which the children were sexually abused by defendant, noting not only that the abuse occurred over many years but also encompassed innumerable incidents of violation by the defendant. As part of its explication for the departure and impliedly the proportionality of the sentence imposed, the trial court indicated that it did not believe “that the years of abuse or that the age of the victims have adequately been taken into account nor do I think that the number of times that the victims were assaulted through the years has been taken into account and, for those reasons, the Court feels that it is appropriate to go above and beyond the guidelines.”

The trial court further recognized and addressed the issue of proportionality of the sentences imposed. The trial court explained her departure of “almost 12 years from the minimum guidelines” was attributable, at least in part, to its belief “that certain of the guidelines [did not] adequately [take] into account, gave the appropriate weight . . . for the . . . profound abuse . . . that took place in this case.” In departing from the guidelines, the trial court indicated its departure was premised on the existence of two victims, their ages and the predatory conduct of defendant. The court recognized that “one of the offense variables requires that we show a patterns [sic] of behavior of three or more instances of . . . sexual abuse. . . .” The trial court articulated that both the departure and why it was necessary to attain a proportionate sentence was premised on “the number of years of abuse that went on in this matter, we’re talking about hundreds, hundreds of instances of abuse to establish this pattern of behavior. . . . [N]ot at all accounted for by the guidelines.” In addition, the trial court specifically averred that it justified the amount of the departure by reasoning that a six year departure for each of the two victims “was justified” when taking into account “the age, the predatory conduct and the years of abuse [for the] two victims” and the failure of the guidelines to contemplate or incorporate the years and number of instances of abuse suffered by each of the victims at the hands of defendant. In addition to verbally explaining its reasoning at the hearing, the trial court also reduced its ruling and justifications to writing by summarizing its findings in the Sentencing Information Report Departure Evaluation.

We find that the efforts and explanations provided by the trial court served to sufficiently comply with the requirements of *Smith* by providing a detailed justification for both the departure and its proportionality.

Affirmed.

/s/ William B. Murphy  
/s/ Cynthia Diane Stephens  
/s/ Michael J. Riordan